

United States
Circuit Court of Appeals

For the Ninth Circuit.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record.

UPON PETITIONS TO REVIEW ORDERS OF THE UNITED STATES
BOARD OF TAX APPEALS.

FILED

JAN - 2 1929

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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[1*] DOCKET 10037.

PORTLAND CREMATION ASSOCIATION,
East 14th Street & Bybee Ave., Portland,
Oreg.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:

GEO. W. JOSEPH, Esq.

CHAS. E. McCULLOCH, Esq.

For the Commissioner:

SHELBY S. FAULKNER, Esq.

W. F. GIBBS, Esq.

DOCKET ENTRIES.

1925.

Dec. 17—Petition received and filed.

Dec. 23—Copy of petition served on solicitor.

Dec. 23—Notification of receipt mailed taxpayer.

1926.

Jan. 22—Answer filed by solicitor.

Jan. 29—Copy of answer served on taxpayer.
Assigned to field calendar.

1927.

Feb. 15—Hearing set 4-18-27, Portland, Oreg.

April 18—Hearing had before Mr. Arundell. To

*Page-number appearing at the top of page of original certified Transcript of Record.

be consolidated with 22158 and 23912.

Submitted upon stipulation of facts.

Briefs due 7-1-27.

May 9—Transcript of hearing 4-18-27 filed.

June 28—Memorandum brief filed by G. C.

July 1—Order granting taxpayer extension to
7-15-27 to file brief signed and filed.
Both sides notified.

July 4—Brief filed by taxpayer. (Proposed find-
ings included.)

1928.

Jan. 20—Findings of fact and opinion rendered
(Sternhagen). Judgment will be en-
tered on 15 days' notice under Rule 50.

Mar. 9—Motion for redetermination filed by G. C.

Mar. 13—Notice allowing taxpayer until 4-10-28
to file alternative settlement for hear-
ing on 4-19-28. Failure to do so, ap-
peal set for 4-17-28.

April 17—Hearing had before Mr. Littleton on
settlement. Assigned Mr. Sternhagen.

April 19—Judgment entered.

Oct. 18—Petition for review by U. S. Cir. Ct. of
Appeals, 9th Circuit, with assignments
of error filed by taxpayer.

Oct. 19—Proof of service filed.

Oct. 26—Praecipe for record filed by taxpayer.

Oct. 26—Proof of service filed.

Now, December 7, 1928, the foregoing docket en-
tries certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[2] DOCKET 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:

GEO. W. JOSEPH, Esq.

CHAS. E. McCULLOCH, Esq.

For the Commissioner:

SHELBY S. FAULKNER, Esq.

W. F. GIBBS, Esq.

DOCKET ENTRIES.

1926.

Dec. 27—Petition received and filed. Taxpayer notified.

Dec. 28—Copy of petition served on general counsel.

1927.

Feb. 26—Answer filed by G. C.

Mar. 26—Copy of answer served on taxpayer. Circuit Calendar.

April 12—Hearing set 4-18-27 Portland, Oreg.

April 18—Hearing had before Mr. Arundell on stipulation of facts. Consolidated with 10037 and 22912. Briefs due 7-1-27.

May 9—Transcript of hearing 4-18-27 filed.

June 28—Memorandum brief filed by G. C.

July 1—Order granting extension to 7-15-27 to file brief for the taxpayer signed and filed. Both sides notified.

July 4—Brief filed by taxpayer. (Proposed findings included.)

1928.

Jan. 20—Findings of fact and opinion rendered (Sternhagen). Judgment will be entered on 15 days' notice under Rule 50.

Mar. 9—Motion for redetermination filed by G. C.

Mar. 13—Notice allowing taxpayer until 4-10-28 to file alternative settlement for hearing 4-19-28. Failure to do so, appeal set for 4-17-28.

April 17—Hearing had before Mr. Littleton on settlement. Assigned to Mr. Sternhagen for order.

April 19—Judgment entered.

Oct. 18—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Oct. 19—Proof of service filed.

Oct. 26—Praecipe for record filed by taxpayer.

Oct. 26—Proof of service filed by taxpayer.

Now, December 7, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[3] DOCKET 23912.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:

GEO. W. JOSEPH, Esq.

CHAS. E. McCULLOCH, Esq.

For the Commissioner:

SHELBY S. FAULKNER, Esq.

W. F. GIBBS, Esq.

DOCKET ENTRIES.

1927.

Feb. 9—Petition received and filed. Taxpayer notified.

Feb. 11—Copy of petition served on General Counsel.

Mar. 19—Answer filed by G. C.

April 1—Copy of answer served on taxpayer. Assigned Circuit Calendar.

April 12—Hearing date set 4-18-27, Multnomah County Court House, Portland, Oreg.

April 18—Hearing had before Mr. Arundell on stipulation of facts. Briefs due 7-1-27.

May 9—Transcript of hearing 4-18-27 filed.

June 28—Memorandum brief filed by G. C.

- July 1—Order extending time to 7-15-27 to file brief signed and filed. Both sides notified.
- July 4—Brief filed by taxpayer. (Proposed findings included.)

1928.

- Jan. 20—Findings of fact and opinion rendered (Mr. Sternhagen). Judgment will be entered on 15 days' notice under Rule 50.
- Mar. 9—Motion for redetermination filed by G. C.
- Mar. 13—Notice allowing taxpayer until 4-10-28 to file alternative settlement for hearing 4-19-28. Failure to do so, hearing date set 4-17-28.
- April 17—Hearing had before Mr. Littleton on settlement under Rule 50. To Mr. Sternhagen for order.
- April 20—Judgment redetermining deficiency entered.
- Oct. 18—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Oct. 19—Proof of service filed.
- Oct. 26—Praecipe for record filed by taxpayer.
- Oct. 26—Proof of service filed by taxpayer.

Now, December 7, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[4] Filed Dec. 17, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10037.

Appeal of PORTLAND CREMATION ASSOCIATION, East 14th St. and Bybee Ave., Portland, Oregon.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:-SM:60D:RJR:B-17263) dated November 3, 1925; further explained in Bureau letter (IT:CA:Ms:-2501-JM) dated February 5, 1923; and Bureau letter (IT:E:SM:RLC:B-17263) dated May 22, 1925 (Copies of each letter attached), and as a basis of its appeal sets forth the following:

(1) The taxpayer is a corporation organized under the laws of the State of Oregon, incorporated and commenced business April 24, 1900, its principal office and place of business being located at East Fourteenth Street and Bybee Avenue, Portland, Oregon.

(2) The final deficiency letter was dated November 3, 1925, the date of mailing to the taxpayer being unknown. For full explanation of the controversy it will be necessary to refer to Bureau letters of February 5, 1923 and May 22, 1925.

(3) The taxes in controversy are income and

profits taxes for the calendar year 1919 and are less than \$10,000, to wit, the sum of \$5764.69.

(4) The determination of tax contained in said deficiency letters is based upon the following error:

In determining the taxpayer's net income for 1919, the amount of \$12,827.16 set up and deducted for 1919 as a Reserve for Maintenance, has been erroneously added to taxable income, such addition resulting in the major part of the proposed tax of \$5764.69. The item of \$94.22 restored to taxable income by the Commissioner on the theory that it was a capital expenditure, is not contested.

(5) The facts upon which the taxpayer relies as the basis of its appeal are as follows:

This corporation has an incinerator plant for the cremation of human bodies, and constructs, maintains and operates columbaria, or niches, for the preservation of the ashes of the remains so incinerated. It also erects, maintains and operates vaults for the reception and burial of human remains not incinerated.

The vaults and niches are sold under contracts providing for perpetual care therefor. To make this liability clear and thoroughly understood, copies of each contract are hereto attached, marked Exhibit "A."

The covenant on the part of the taxpayer to so maintain each vault and niche forever is embodied in each contract issued, [5] and the provision for maintenance is incorporated in both the original articles and the supplementary articles of said corporation.

The growth of the corporation was small during the first years of its existence, and it was not until 1913 that the necessity for a trust fund to carry out the terms of the contracts became so apparent that the Board of Directors by resolution dated March 4, 1913, established a perpetual care fund by setting aside ten per cent of the gross receipts from sale of vaults and niches.

The corporation continued to operate under this provision until the year 1919 when by resolution of the stockholders, the Board of Directors were instructed to increase the percentage for the Reserve for Maintenance to 20%, which amount has been so set aside as a Reserve for Maintenance since.

The Reserve for Maintenance is set up as a liability account for a specific purpose, to wit: the strict fulfillment and compliance with the contracts of the holders of niches and vaults. Not one dollar of this fund inures to the benefit of the stockholders. It is a trust fund created by the clients who purchased niches and vaults. The sums so segregated are a sacred trust, created for this one purpose only, and in no sense is it a profit of or benefit to, the stockholders of the corporation.

The Reserve for Maintenance cannot be considered taxable income, as there is no element of profit in the maintenance fund itself. The only possible element of profit connected with this trust fund set up for perpetual care is that the income from the fund is used in the care and maintenance of the vaults and niches. This income is mingled

with other income of the taxpayer, and accounted for in the income tax returns of the taxpayer.

(6) The taxpayer, in support of its appeal, relies upon the following propositions of law:

(a) The sums received by a corporation of this nature for the purpose of carrying out its contracts for perpetual care, and without which the contracts issued could never be carried to completion, do not fall within the definition of gross income as defined in section 233(a) and 213 of the Revenue Act of 1918.

(b) The taxpayer sells nothing upon which a gain can be made, to a person who holds a contract for perpetual care. (Ex. "A.")

(c) No part of the Reserve for Maintenance can be diverted by the Directors from this fund to any other fund, or for the general use of the corporation.

(d) The taxpayer, as a trustee, can exercise no discretion as to the distribution of the funds accumulated from perpetual care contracts. It is bound to perform a definite service with the fund, and from this service there can be no gain which would be taxable income.

(e) Without this Reserve for Maintenance, the taxpayer could never carry out the terms of its contracts; the fund is a necessity to guarantee the fulfillment of the taxpayer's obligation. Therefore, this fund, set aside for a specific and necessary purpose, is not, and never can become, a gain or profit

to the corporation. There being no element of profit, there can be no taxable income.

[6] (f) A study of the contracts indicate that what is actually sold is the right to use a vault or niche assigned to the purchaser forever, but such vault or niche remains in the custody and care of the association. The corporation, in addition, obligates itself to maintain the vault or niche for the purchaser, without expense, for an unlimited period of time, specified as "forever" in the contract itself. Under these conditions, it is clearly erroneous to allocate the entire receipts from the sale as a profit in the year contract is made and the money collected. It can surely not be construed that the money received for a service which will extend over a long period of time, the cost of which service cannot be determined at the date the money is paid, is a realized profit as of the date so received. Yet this is the contention of the Commissioner.

(g) We are content to allow the Reserve for Maintenance to be considered sufficient to carry out the contracts of the corporation, and to return the 80% of the gross sales as taxable income. If this cannot be done, we ask that the Board determine the contract to be a lease over a long period, and the payments received be construed as rentals, paid in advance, and as such to be included in profits only as realized, over a period of time which might approximate 100 years. This adjustment might give the needed relief. This procedure is suggested only in the event that relief is otherwise impossible.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine its appeal.

GEO. W. JOSEPH,
Counsel for Taxpayer,
Corbett Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

Geo. W. Baldwin, being duly sworn, says that he is vice-president of the Portland Cremation Association, above named, and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

GEO. W. BALDWIN.

Sworn to before me this 30 day of November, 1925.

[Seal]

E. V. LITTLEFIELD,
Notary Public.

My commission expires March 22, 1929.

[7] Nov. 3, 1925.

IT:E:SM-60D.

RJR:B-17263.

Portland Cremation Association,
E. 14th & Bybee,
Portland, Oregon.

Sirs:

An audit of your income and profits tax return for the year ended December 31, 1919, has resulted in the determination of a deficiency in tax of \$5,-764.69, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:60D—RJR:B-17263.

In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By C. R. NASH,
Assistant to the Commissioner.

Inclosures:

Statements.

Agreement—Form A.

STATEMENT.

IT:E:SM:60D.

RJR:B-17263.

In re: PORTLAND CREMATION ASSOCIATION, E. 14th & Bybee, Portland, Oregon.

Deficiency

1919

\$5764.69

Further explanation of the adjustment is shown in Bureau letters dated February 5, 1923, and May 22, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that [8] the Bureau holds that an audit of your case discloses the fact that your profits tax as computed under Section 301 is not in excess of the average profits tax paid by a group of representative concerns engaged in a like or similar trade or business to that of your company. Accordingly, the conclusions set forth in the above-mentioned letters are sustained.

[9] February 5, 1923.

IT:CA:Ms-2501.

JM.

Portland Cremation Association,
E. 14th St. & Bybee Avenue,
Portland, Oregon.

Sirs:

An examination of your income tax return for the year 1919 discloses an additional tax liability for the year 1919 aggregating \$5764.69, and over-assessment for the year — amounting to \$—— as shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:CA:Ms, 2501-JM, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed

for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,
E. W. CHATTERTON,
Deputy Commissioner,
By M. R. CLUTE,
Head of Division.

STATEMENT.

Feb. 5, 1923.

IT:CA:Ms.

2501-JM.

[10] In re: PORTLAND CREMATION ASSOCIATION, E. 14th St. & Bybee Ave., Portland, Oregon.

Additional Tax—\$5764.69.

The above additional tax is due to increasing net income by the following amounts:

Expenditure for Carpet and Iron Basket	\$ 94.22
Deduction from Gross Sales for Maintenance Fund\$12827.16
	<hr/>
Total addition to net income.....	\$12921.38
	<hr/>

The first two items are capital expenditures.

The charge to Reserve for Maintenance, \$12,827.16 is not a proper deduction from gross income.

[11] May 22, 1925.

IT:E:SM

RLC-B-17263

Sirs:

An audit of your income and profits tax return for the year 1919, has resulted in the determination of a deficiency in tax of \$5,764.69 as shown by Bureau letter dated February 5, 1923.

You are granted 30 days from the date of this letter within which to present a protest, supported

by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter.

A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the United States Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the in-

closed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM RLC:B-17263. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
(Signed) J. G. BRIGHT,
Deputy Commissioner.

Inclosures:

Statements

Agreement—Form A

STATEMENT.

IT:E:SM.

RLC:B-17263.

In re: PORTLAND CREMATION ASSOCIATION, East 14th Street & Bybee Ave., Portland, Oregon.

[12] 1919

Deficiency in Tax \$5,764.69.

You are advised that after careful consideration and review your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of the Revenue Act of 1918, has been denied in view of the fact that it is found that your profits tax as computed under the provisions of Section 301 is not in excess of the average profits tax paid by a group of representative concerns which in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

In accordance with the above action the additional tax of \$5,764.69 as shown by Bureau letter dated February 5, 1923, is affirmed.

Now, December 7, 1928, the foregoing petition certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[13] Filed Jan. 22, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10037.

In re: Appeal of PORTLAND CREMATION ASSOCIATION, East 14th St. and Bybee Avenue, Portland, Oregon.

ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and avers, as follows:

(1) Admits the allegations contained in paragraphs 1 and 3 and the first sentence of paragraph 2.

(2) Admits that taxpayer's income for 1919 was increased by the amount of \$12,827.16 representing amounts set up on its books for perpetual maintenance.

(3) Admits that in 1913 a 10 per cent reserve for maintenance was set up by the Board of Directors which amount was increased to 20 per cent in 1919. It is alleged that the contracts with the holders of niches and vaults referred to in the petition do not create a trust fund for perpetual maintenance but merely obligate the taxpayer to perpetually maintain the niches and vaults.

(4) Denies each and every other material allegation of fact contained in the petition.

PROPOSITION OF LAW.

The taxpayer has not set apart a trust fund for perpetual maintenance but has merely obligated itself by enforceable contract to maintain the niches and vaults. (See Appeal of Springdale Cemetery Association decided December 21, 1925.)

[14] WHEREFORE it is prayed that taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,

Solicitor of Internal Revenue, Attorney for Commissioner of Internal Revenue.

Of Counsel:

A. H. FAST,

Special Attorney, Bureau of Internal Revenue.

Now, December 7, 1928, the following answer certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[15] Filed Dec. 27, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CA:2554-16-60D) dated November 15, 1926, and as a basis of his proceedings alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Oregon, with its principal office and place of business located at East 14th Street and Bybee Avenue, Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on November 15, 1926.

3. The tax in controversy *are* income taxes for the calendar year of 1922, and for two thousand one hundred ninety-two dollars and twenty-five cents (\$2,192.25).

4. The determination of tax set forth in notice of deficiency is based upon the following error:

(a) This taxpayer has an incinerator plant for the cremation of human bodies, and constructs, maintains and operates columbaria, or niches, for the preservation of the ashes of the remains so incinerated; it also erects, maintains and operates vaults for the reception and burial of human remains not incinerated.

(b) The vaults and niches referred to are sold under contracts providing for perpetual care and maintenance therefor. Copies of the deeds or contracts covering the sale of niches and vaults and the agreement for perpetual care are hereto attached, marked Exhibit "B."

[16] (c) In order to carry out the terms of the contracts this taxpayer, has for a long period of time, set aside into a maintenance fund twenty per cent of the sum received for the sales of vaults and niches. This action was taken by authority and under instructions of the stockholders of the corporation; it having been determined that this amount was necessary and adequate to maintain the vaults and niches sold in accordance with the terms of sale and guarantees thereon.

(d) An inspection of the plant of the taxpayer reveals the fact that several units have been constructed at a large cost, and that the niches and vaults in such units after being disposed of bring no further income to the corporation from the date so disposed of to the end of time. Each unit when disposed of and in use, not only ceases to be an asset

to the corporation, but at once becomes an actual and a continuing liability increasing annually with the age of the unit buildings.

(e) Due to the peculiar nature of the business and the necessity inherent to fulfill the sacred trusts imposed by the contracts of sale themselves, the establishment of an adequate maintenance fund is absolutely imperative. In no other manner can further care of the trusts be assured.

(f) There is no element of profit in the establishment of this taxpayer's Reserve for Maintenance and it is in no sense taxable income.

(g) The principle permitting the establishment of a duly authorized maintenance fund, properly treated as a trust fund has been established in the case of Cemetery Associations by decisions of the United States Board of Tax Appeals concurred in by the Commissioner of Internal Revenue. While this taxpayer is not a Cemetery Association, still its obligations to properly maintain its vaults and niches sold under the contracts referred to are similarly binding. This taxpayer, however owing to the construction of its plant, requires a larger Reserve for Maintenance than would be necessary in an ordinary Cemetery Association. Reference is made to Docket No. 293, Decision 713, of the United States Board of Tax Appeals in the case of the Los Angeles Cemetery Association.

(h) The sums received by the corporation for the Reserve for Maintenance are and always have been treated as a trust fund. No part of the Reserve for Maintenance can be diverted by the Di-

rectors from this fund to any other fund or for the general use of the corporation. Such trust funds must at all times be used only for the purpose of carrying out the written contracts and guarantees of the petitioner.

[17] 6. Wherefore the petitioner prays that this Board may hear the proceedings and determine that the Reserve for Maintenance in the sum of seventeen thousand five hundred thirty-eight dollars and three cents (\$17,538.03) be not included in the ordinary business and net income of this taxpayer for the calendar year 1922; that there is no deficiency due from the petitioner for the year 1922.

(Signed) GEO. W. JOSEPH,
Counsel for Petitioner,
Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

E. M. Welch, being duly sworn, states that he is president of the Portland Cremation Association, the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition and is familiar with the statements therein contained and that the facts therein stated are true.

E. M. WELCH.

Subscribed to before me this 20th day of December, A. D. 1926.

[Seal]

E. V. LITTLEFIELD,
Notary Public for Oregon.

Commission expires Mar. 22, 1929.

[18] EXHIBIT "A"

TREASURY DEPARTMENT, WASHINGTON.

Office of

Commissioner of Internal Revenue

IT:GA:2554-16-60D

November 15, 1926.

Portland Cremation Association,
East 14th and Bybee Avenue,
Portland, Oregon.

Sirs:

The determination of your income tax liability for the year 1922, as set forth in office letter dated September 23, 1926, disclosed a deficiency in tax amounting to \$2,192.25, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a

taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:GA:2554-16-60D.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.

By C. R. NASH,
Assistant to the Commissioner.

Inclosures:

Statement

Form A

Form 882

[19] STATEMENT.

IT:GA:2554-16-60D.

In re: PORTLAND CREMATION ASSOCIATION, East 14th and Bybee Avenue, Portland, Oregon.

Year Deficiency in Tax.

1922 \$2,192.25.

Net income reported on return\$30,324.85

Add:

Addition to reserve for maintenance 17,538.03

Net income corrected\$47,862.88

EXPLANATION OF ADJUSTMENT.

Additions to the reserve for maintenance are held to constitute taxable income. (Article 541, Regulations 62.)

COMPUTATION OF TAX.

Net income subject to tax at 12½%\$47,862.88

Tax liability\$ 5,982.86

Tax assessed 3,790.61

Deficiency in tax\$ 2,192.25

Your protest dated October 8, 1926, has been considered and your contentions relative to the addition to reserve for maintenance must be denied. This decision is based upon a ruling made by the Bureau in connection with your return for the year 1919. In this decision it was held that the increase in the reserve for maintenance was taxable income.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, December 7, 1928, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[20] Filed Feb. 26, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue by his attorney A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Admits the allegations contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

Denies each and every other material allegation of fact contained in the petition.

WHEREFORE, it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

JULIAN G. GIBBS,
Special Attorney,
Bureau of Internal Revenue.

Now, December 7, 1928, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[21] Filed Feb. 9, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:SM:60D-RCH-C-30414-D-30415), dated January 18, 1927, and as a basis of his proceedings alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Oregon, with its principal office and place of business located at East 14th Street and Bybee Avenue, Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on January 18, 1927.

3. The taxes in controversy are income taxes for the calendar year 1920, forty-four hundred two and 68/100 dollars, and for the calendar year 1921, forty-five hundred nineteen and 65/100 dollars; the total for the two years being eighty-nine hundred twenty-two and 33/100 dollars.

4. The determination of tax set forth in notice of deficiency is based upon the following error:

[22] (a) This taxpayer has an incinerator plant for the cremation of human bodies, and constructs, maintains and operates columbaria or niches, for the preservation of the ashes of the remains so incinerated; it also erects, maintains and operates vaults for the reception and burial of human remains not incinerated.

(b) The vaults and niches referred to are sold

under contracts providing for perpetual care and maintenance therefor. Copies of the deeds or contracts covering the sale of niches and vaults and the agreement for perpetual care are hereto attached, marked Exhibit "B."

(c) In order to carry out the terms of the contracts this taxpayer, has for a long period of time, set aside into a maintenance fund twenty per cent of the sum received for the sales of vaults and niches. This action was taken by authority and under instructions of the stockholders of the corporation; it having been determined that this amount was necessary and adequate to maintain the vaults and niches sold in accordance with the terms of sale and guarantees thereon.

(d) An inspection of the plant of the taxpayer reveals the fact that several units have been constructed at a large cost, and that the niches and vaults in such units after being disposed of bring no further income to the corporation from the date so disposed of to the end of time. Each unit when disposed of and in use, not only ceases to be an asset to the corporation, but at once becomes an actual and a continuing liability increasing annually with the age of the unit buildings.

(e) Due to the peculiar nature of the business and the necessity inherent to fulfill the sacred trusts imposed by the contracts of sale themselves, the establishment of an adequate maintenance fund is absolutely imperative. In no other manner can further care of the trusts be assured.

(f) There is no element of profit in the establish-

ment of this taxpayer's Reserve for Maintenance and it is in no sense taxable income.

[23] (g) The principle permitting the establishment of a duly authorized Maintenance Fund, properly treated as a trust fund has been established in the case of Cemetery Associations by decision of the United States Board of Tax Appeals concurred in by the Commissioner of Internal Revenue. While this taxpayer is not a Cemetery Association, still its obligations to properly maintain its vaults and niches sold under the contracts referred to are similarly binding. This taxpayer, however, owing to the construction of its plant, requires a larger Reserve for Maintenance than would be necessary in an ordinary Cemetery Association. Reference is made to Docket No. 293, Decision 713, of the United States Board of Tax Appeals in the case of the Los Angeles Cemetery Association; Docket No. 3000, Decision 869, Greenwood Cemetery Association; Docket No. 437, Decision 1634, The Metaire Cemetery Association.

(h) The sums received by the corporation for the Reserve for Maintenance are and always have been treated as a trust fund. No part of the Reserve for Maintenance can be diverted by the Directors from this fund to any other fund or for the general use of the corporation. Such trust funds must at all times be used only for the purpose of carrying out the written contracts and guarantees of the petitioner.

6. Wherefore, the petitioner prays that this Board may hear the proceedings and determine that

the Reserve for Maintenance set aside by this taxpayer be not included in the ordinary business and net income of this taxpayer for the calendar years 1920 and 1921; that there is no deficiency due from the petitioner for the years 1920 and 1921.

E. V. LITTLEFIELD,

Counsel for Petitioner.

Yeon Building, Portland, Oregon.

[24] State of Oregon,
County of Multnomah,—ss.

Geo. W. Baldwin, being duly sworn, states that he is vice-president of the Portland Cremation Association, the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he is familiar with the statements therein contained, and that the facts therein stated are true.

GEO. W. BALDWIN.

Subscribed and sworn to this 3d day of February,
1927.

[Seal]

E. V. LITTLEFIELD,

Notary Public for Oregon.

My commission expires March 22, 1929.

[25] EXHIBIT "A."

TREASURY DEPARTMENT,
WASHINGTON.

Office of
Commissioner of Internal Revenue.

January 18, 1927.

It:E:SM:60D.

RCH-C-30414.

D-30415.

Portland Cremation Association,
East 14th Street and Bybee Avenue,
Portland, Oregon.

Sirs:

An audit of your income and profits tax returns for the calendar years 1920 and 1921 has resulted in the determination of deficiencies in tax of \$4,402.68 and \$4,519.65, respectively, as shown in Bureau letter dated September 22, 1926.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 50 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of

Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:60D:RCH-C-30414-D-30-415. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner,

By C. R. NASH,

Assistant to the Commissioner.

Inclosures:

Statement.

Form A.

Form 882.

[26] STATEMENT.

IT:E:SM:60D.

RCH-C-30414.

D-30415.

In re: PORTLAND CREMATION ASSOCIATION, East 14th Street and Bybee Avenue, Portland, Oregon.

Year.	Deficiency In Tax.
1920	\$4,402.68
1921	4,519.65
	<hr/>
Total	\$8,922.33

Reference is made to your protest dated October 7, 1926, against the inclusion of increases in a maintenance fund in your taxable net income as shown in Bureau letters dated June 9, 1926, and September 22, 1926.

After a careful review of your protest and all the evidence submitted in support of your contentions, you are advised that the Bureau holds that the information on file is insufficient to warrant the exclusion from income of the items in question. It is stated in your protest that the question of the treatment of the additions to the maintenance fund is now before the United States Board of Tax Appeals with respect to an earlier year. It is noted, however, that no decision has yet been made by that Board; no allowance has, therefore, been

made on account of your protest covering the years 1920 and 1921.

The conclusions of which you were advised in Bureau letter dated September 22, 1926, are, therefore, sustained.

Now, December 7, 1928, the foregoing petition certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[27] Filed Mar. 19, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION,
Portland, Oregon,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph (1) of the petition.

2. Admits the allegations contained in paragraph (2) of the petition.

3. Admits the allegations contained in paragraph (3) of the petition.

4. Admits the allegations contained in sub-paragraphs (a) and (b) of paragraph (4) of the petition.

Denies each and every other material allegation of fact contained in the petition.

WHEREFORE, it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel,

Bureau of Internal Revenue.

Of Counsel:

SHELBY S. FAULKNER,

Special Attorney, Bureau of Internal
Revenue.

Now, December 7, 1928, the foregoing Answer certified from the record as a true copy.

[Seal]

B. L. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[28] U. S. Board of Tax Appeals. Filed at Hearing, Apr. 18, 1927. Div. 7. Docket 10037, 22158, 22912.

The United States Board of Tax Appeals.

No. 10,037.

Appeal of PORTLAND CREMATION ASSOCIATION, Portland, Oregon.

STIPULATION OF FACTS.

It is stipulated as follows by the petitioner and the respondent:

1. The petitioner is a corporation for profit organized under the general corporation laws of Oregon. By its charter its duration is perpetual. Its powers are set out as follows in its charter:

“The enterprise, business, pursuit and occupation in which this corporation proposes to engage is that of building, constructing, maintaining and operating crematories and columbaria and conducting the business of incinerating human remains, the burial and perpetual care of the ashes resulting therefrom; and, in connection therewith, to establish, maintain and conduct the business of funeral directors and undertakers. Said corporation shall also have power to issue, sell and dispose of certificates entitling the holder thereof to one cremation. And for any and all of such purposes, said corporation shall have power to acquire and take, by purchase, lease, donation, devise, or otherwise, the necessary land, real estate, or personal property. And said corporation, for any of its said corporate purposes,

shall have power to borrow money and to issue therefor its promissory notes.”

[29] 2. The petitioner during all of the years 1919, 1920, 1921 and 1922, was engaged in the business of operating a crematorium in the city of Portland, Oregon, for the incineration of human remains and owning and operating a building in which were niches for the repository of urns containing the ashes of incinerated human bodies and vaults for the burial of the dead.

3. During all of said years petitioner sold niches and vaults for the aforesaid purposes and gave to purchasers deeds covering such niches and vault spaces, such deeds being in the form of the drafts of deed attached hereto marked respectively Exhibit 1 and Exhibit 2; Exhibit 1 covering niches and Exhibit 2 covering vaults.

4. During all of said years petitioner placed in a permanent maintenance fund 20 per centum of the gross selling price of all urns, niches and vaults sold by it, the amounts placed in said fund for each of said years being as follows:

1919	\$12,827.16
1920	17,906.20
1921	17,076.73
1922	17,558.03

5. At a meeting of the directors held on March 4, 1913, the following resolution was adopted:

[30] “On motion it was ordered by the board that ten per cent of all receipts for sale of niches and vaults be set apart as and for a maintenance fund.”

6. On December 1, 1918, the present stockholders acquired all of the stock of the petitioner, but from and after that date until March 3, 1920, there was no legally constituted Board of Directors and no legally elected officers, but E. M. Welch, Olive Jones, and George W. Baldwin acted as the board of directors and officers of petitioner.

7. No formal meeting of the stockholders was held from prior to December 1, 1918, until December 11, 1919, upon which latter date a meeting was held. A copy of the minutes of said meeting is attached hereto as Exhibit 3.

8. No formal meeting of the directors was held from prior to December 1, 1918, until March 3, 1920, at which date a meeting was held. A copy of the minutes of said meeting is attached hereto as Exhibit 4.

9. The said deductions of 20 per centum of the gross selling price of urns, niches and vaults for the maintenance fund mentioned in paragraph 4 hereof were made in 1919 pursuant to informal agreement of the acting board of directors and officers and confirmed by the stockholders and directors at the said meetings mentioned in paragraphs 7 and 8 of this stipulation. In 1920, 1921 and 1922, all additions to the maintenance fund were [31] made pursuant to and under authority of the said resolutions.

10. The income from said fund has been at all times used for the maintenance and upkeep of the property so sold, but always through the regular income and expense accounts of the corporation.

In other words, the income from the maintenance fund was mingled with other income of the petitioner and was expended for maintenance along with other funds of petitioner. The income from the maintenance fund was for each of the years in question credited directly to the profit and loss account of the corporation.

11. The deeds referred to as Exhibits 1 and 2 do not contain any reference to the maintenance fund, but all sales were made with the representation to the purchaser that the covenant to maintain the property was backed by a permanent maintenance fund and that a portion of the purchase price paid by such purchaser would be placed in the maintenance fund. It was also represented to each purchaser that the maintenance fund could not and would not be used for any other purpose. No specific representation was made as to the handling and control of the funds unless the purchaser made specific inquiry, in which event he was informed that the handling and control were with the petitioner.

12. The maintenance and upkeep of the property during each of the years in question required more money than the income [32] from the maintenance fund. The deficiency was supplied from the income of the petitioner and not from the principal of the maintenance fund.

13. On its books of account the petitioner reported as gross sales the amount received from purchasers of urns, niches and vaults less 20% thereof which was placed in the maintenance fund,

and which did not appear as a part of the items "gross sales."

14. Prior to November 3, 1920, there was no separate investment account maintained in the petitioner's books for the maintenance fund, but the amounts in said investment fund were in part mingled with other assets of the petitioner. On November 3, 1920, the petitioner invested \$29,816.51 in United States Liberty Loan Bonds, and these bonds were carried in an account entitled "Investment—Reserve for Maintenance—(Liberty Bonds, W. S. S., etc.)" There were no changes in this account to December 31, 1920, at which time it showed a balance of \$29,816.51. Additions to the investment account representing Liberty Bonds and War Savings Stamps were made during 1921, the balance of the account at December 31, 1921, being \$35,548.09, all of which was invested in Liberty Bonds and War Savings Stamps. In 1922 there were added to the account items of Liberty Bonds, corporate stocks, War Savings Stamps, and cash, and there was likewise a withdrawal of Liberty Bonds, which left a balance in the account at December 31, 1922, of \$65,348.12, included in which was a loan of \$20,000.00 made by the maintenance fund to the petitioner corporation, which loan was used by petitioner for its corporate purposes.

[32] 15. The petitioner declared no dividends during the years 1919, 1920, 1921 and 1922.

CHARLES E. McCULLOCH,
Attorney for Petitioner.

A. W. GREGG,
Attorney for Commissioner of Internal Revenue.

Per S. S. FAULKNER,
Special Attorney.

[34] EXHIBIT No. 1.

KNOW ALL MEN BY THESE PRESENTS, that Portland Cremation Association, a corporation, of Portland, Oregon, grantor, in consideration of Dollars (\$....) to it paid by, grantee, the receipt of which is hereby acknowledged, has bargained and sold and does hereby grant and convey to said grantee the perpetual and exclusive right to use for the deposit and repose of incinerated human remains, niche numbered, of tier, of section, of Chamber, in the Columbarium of Portland Cremation Association situate in the City of Portland, in the State of Oregon, which right to use said niche is subject, however, to such reasonable rules and regulations as now are or may hereafter be prescribed or adopted by said Association for the care and control of said Columbarium, which care and control shall at all times rest exclusively in said Association.

And said grantor does hereby covenant to and with said grantee and heirs to maintain said Columbarium forever; provided, that if said Asso-

ciation shall abandon its present Columbarium or the part thereof including the above described niche and provide new niches to take the place of those so abandoned, which said Association reserves the right to do, the said grantee or . . . heirs shall then be entitled to another niche of like price and to select the same from such thereof as may be unsold of such new niches for the use aforesaid, in lieu of the one hereinbefore described, subject to said rules and regulations. The prices of such new niches to be fixed by said Association. Provided further; that if the said grantee or . . . heirs shall fail to make such selection of such new niche within ninety days after the abandonment above mentioned, said Association is authorized and hereby reserves the right to make such selection of such new niche for said grantee or . . . heirs, and when such selection shall be so made it shall be binding upon all parties hereto or interested in any of said niches.

Said Columbarium shall be open daily from 9 A. M. to 5 P. M. and said grantee and . . . heirs shall, between said hours and subject to the rules and regulations aforesaid, be admitted thereto for the purpose of visiting said niche.

It is hereby further agreed that said grantee shall and will designate in writing delivered to said Association the names of those whose incinerated remains may be deposited in said niche and no other shall be placed therein.

IN WITNESS WHEREOF, said grantor has caused its corporate name and seal to be hereunto

signed and set at Portland, Oregon, by its President and Secretary this day of, 19...

PORTLAND CREMATION ASSOCIATION,

By,
President.

By,
Secretary.

No. 2401.

[35] EXHIBIT No. 2.

KNOW ALL MEN BY THESE PRESENTS, that Portland Cremation Association, a Corporation of Portland, Oregon, grantor, in consideration of Dollars (\$....), to it paid, by, grantee, has bargained and sold and does hereby grant and convey unto said grantee the perpetual and exclusive right to use for the deposit and repose of human, remains vault No. of Tier in Section, Vault Rooms of said Association, in the City of Portland, Oregon, subject to such reasonable rules and regulations as now are and as may hereafter be prescribed or adopted by said Association, for the care and control of said rooms and the vaults therein. Which care and control shall at all times be and rest exclusively in said Association.

Said grantor hereby covenants with said grantee to maintain said vault forever; Provided, that if said Association shall abandon its vaults now in use and erect new vaults to take the place of those now in use, which said Association hereby reserves

the right to do, the said grantee or heirs shall then be entitled to another vault of like price and to select the same from such thereof as may be unsold of such new vaults, for the use aforesaid, in lieu of the one hereinbefore described, subject to the said rules and regulations. The prices of such new vaults to be fixed by said Association. Provided Further, that if the said grantee and heirs shall fail to make such selection of such new vault within ninety days after such abandonment by this Association of the vaults now in use, this Association is authorized and hereby reserves the right to make such selection for said grantee, and when such selection is so made it shall be binding upon all parties hereto or interested in any of said vaults.

Said vault room shall be opened daily from 9 o'clock A. M. to 5 P. M., and when so open the grantee and heirs shall upon application be admitted thereto for the purpose of visiting said vault, subject to said rules and regulations.

It is also hereby agreed that said grantee may by writing delivered to said Association, designate the names of those whose remains may be placed in said vault and thereafter no other remains shall be placed therein.

IN WITNESS WHEREOF, said Association has caused its corporate name and seal to be here-

unto signed and set by its President and Secretary,
 this day of, A. D. 192.

PORTLAND CREMATION ASSOCIA-

By,
 TION, President.
 By,
 Secretary.

No. 776.

[36] EXHIBIT No. 3.

STOCKHOLDERS' MEETING

of

PORTLAND CREMATION ASSOCIATION.

A meeting of the stockholders of the Portland
 Cremation Association was held at #511 Corbett
 Bldg., Portland, Oregon, on Thursday the 11th
 day of December, 1919, at the hour of 10:00 o'clock
 A. M., there being present the following stockhold-
 ers and representing the number of shares of stock,
 as follows:

E. M. Welch	364 Shares
W. M. Welch, by E. M. Welch, proxy	92 Shares
C. R. Welch by E. M. Welch, proxy	92 Shares
George W. Baldwin	92 Shares
Olive Jones	1 Share

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All of the capital stock of said corporation be-
 ing represented at said meeting excepting one share

of stock outstanding on the stock books of said corporation in the name of Lenora Hogue, but whose address is unknown, said meeting being held by consent of all of said stockholders above named excepting the said Lenora Hogue.

E. M. Welch acted as chairman of said meeting and Olive Jones acted as secretary, whereupon the chairman announced that there was a vacancy in the entire Board of Directors of said corporation by reason of the fact that all [37] of the former directors had ceased to be stockholders of the corporation and were therefore ineligible to act further as directors. Whereupon the chairman announced that nominations were in order for the election of a board of five directors, whereupon the following named persons were unanimously elected as directors of the corporation to serve until the next regular annual meeting or until their successors are elected and qualified:

E. M. Welch, George W. Baldwin, Olive Jones, W. M. Welch and C. R. Welch.

Whereupon E. M. Welch announced that for a number of months prior to said meeting he had acted as president of the corporation without any legal authority therefor, and that Olive Jones had acted as secretary of the corporation without any authority therefor and that himself and Olive Jones had in the conduct, management and operation of said business been compelled to execute certain legal documents for and on behalf of said corporation and had signed said documents as president and secretary of said corporation and in par-

ticular two deeds were executed as and for the deeds of said corporation, one of which was executed in favor of the Portland Railway, Light & Power Company and another deed executed in favor of John Clark Estate, and that the execution and delivery of those deeds was essential to the business of said corporation and for the best interest of said corporation; whereupon George [38] W. Baldwin introduced the following resolution, which was unanimously adopted:

“RESOLVED that the stockholders of this corporation ratify and confirm all acts of E. M. Welch, as President of this corporation, and Olive Jones, as Secretary of the corporation, since the 1st day of December, 1919; and,

BE IT FURTHER RESOLVED that the stockholders at this meeting request that the Board of Directors of this corporation pass a resolution further ratifying and confirming all acts of the said E. M. Welch, as President, and Olive Jones, as Secretary of the corporation, and more particularly ratifying and confirming the execution and delivery of the deeds heretofore issued to the Portland Railway, Light & Power Company and to the John Clark Estate.”

The following resolution was then introduced and unanimously adopted:

“WHEREAS, at a meeting of the Board of Directors of this corporation, held on the 4th day of March, 1913, a resolution was adopted authorizing and directing that ten per cent. of

all receipts for niches, urns and vaults be set aside as a maintenance fund; and,

WHEREAS, ten percent. of said receipts is not sufficient for said maintenance fund:

NOW, THEREFORE, be it resolved that the stockholders recommend to the Board of Directors that from and after January 1, 1919, twenty per cent. of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of this corporation."

There being no further business the meeting was, upon motion adjourned.

OLIVE JONES,
Secretary.

E. M. WELCH,
President.

[39] EXHIBIT No. 4.

MEETING OF BOARD OF DIRECTORS
of
PORTLAND CREMATION ASSOCIATION.

A meeting of the Board of Directors of the Portland Cremation Association was held at 511 Corbett Bldg., Portland, Oregon, on the 3rd day of March, 1920, at the hour of 10:00 o'clock A. M., there being present E. M. Welch, George W. Baldwin and Olive Jones, a majority of the Board of Directors of said corporation, Directors W. M. Welch and C. R. Welch having filed with the secretary of the cor-

poration their consent to said meeting and a waiver of notice regarding same, whereupon the following business was transacted:

E. M. Welch presided as the chairman of said meeting and Olive Jones acted as secretary. Whereupon the chairman announced that it was necessary to elect officers of said corporation for the ensuing year or until their successors are elected and qualified, whereupon the following directors were elected as officers of the corporation:

E. M. WELCH,
President.

GEORGE W. BALDWIN,
Vice-President.

[40] Whereupon the chairman announced that the next order of business was the appointment of the following officers, to wit:—Secretary, treasurer and superintendent.

Whereupon Olive Jones was appointed as secretary and treasurer of the corporation to hold office during the pleasure of the Board of Directors, and George W. Baldwin was appointed as superintendent of the corporation to hold office during the pleasure of the Board of Directors.

Whereupon E. M. Welch stated that he had acted as president of the corporation since December 1st, 1918, without any legal authority therefor, and that Olive Jones had acted as secretary of said corporation without any legal authority therefor and that in connection with their acts as president and secretary respectively, of said corporation, that they had had to execute certain conveyances and

other documents, all of which were for the benefit of said corporation and that in the transaction of said business for said corporation they had executed two deeds, one to the Portland Railway Light & Power Company, and another deed to the John Clark Estate, and that the stockholders at a meeting held December 11th, 1919, had ratified and confirmed the acts of himself and Olive Jones with the request that the Board of Directors of said corporation further ratify and confirm said acts, [41] whereupon George W. Baldwin presented the following resolution and moved its adoption:

“RESOLVED, That all acts done by E. M. Welch acting as president of this corporation, and Olive Jones acting as secretary of this corporation since the 1st day of December, 1918, be in all things ratified, confirmed and approved, and

“Be It Further Resolved, That should any other conveyances or acquittances be required in order to ratify or confirm any acts heretofore completed by the said E. M. Welch acting as president and Olive Jones acting as secretary that the president and secretary of this corporation be and they are hereby authorized and directed to execute any deeds, acquittances or other documents to fully carry out the ratification or confirmation of said acts.”

Said motion was seconded and the same was unanimously carried.

Whereupon E. M. Welch announced that since May 1st, 1919, certain repairs and improvements had been made upon the property belonging to the corporation and in said repairs and improvements a new mausoleum was under course of construction and that the work was not yet completed but that it would cost approximately \$50,000.00 to complete the improvements which have been under course of construction since May 1st, 1919, but that it was to the best advantage of said corporation that said improvements be completed in order that the revenue and earning capacity of the corporation be increased, but that no authorization had been made by the [42] Board of Directors regarding the expenditure of said sum of money and that he desired that the Board of Directors authorize the expenditure of said sum of money. Whereupon George W. Baldwin introduced the following resolution:

“RESOLVED, That the Board of Directors be and they are hereby authorized to expend not to exceed the sum of \$50,000.00 in making betterments and improvements and including the erection of a mausoleum upon the property of this corporation, and

“Be It Further Resolved, That the president and superintendent of this corporation be and they are hereby authorized and directed to draw checks in payment of all bills incurred for said expenditures.

“And Be It Further Resolved, That all acts taken by the said E. M. Welch prior to this date regarding the repairs, betterments and im-

provements and all expenditures thereon be and they are hereby in all things ratified and confirmed.”

Whereupon said motion was seconded, the same put and unanimously carried.

Whereupon George W. Baldwin announced that the by-laws of the corporation were obsolete, and he thereupon submitted the following by-laws and moved their adoption.

[43] BY-LAWS
of
PORTLAND CREMATION ASSOCIATION.

I.

A meeting of the stockholders of this corporation for the election of directors and for the transaction of other legitimate business shall be held annually at the hour of three o'clock P. M., on the first Monday in January each year, commencing with the year 1921, at the office of the corporation.

Written notice of the time and place of holding such meeting shall be sent to each stockholder by mail or telegraph, or delivered to him in person, at least ten (10) days prior to the time fixed for holding the same.

Each stockholder shall file in writing with the secretary his postoffice address.

II.

A special meeting of the stockholders of this corporation may be held upon the call of the board of

directors, or the secretary of the corporation shall give notice of such meeting upon the written request of any number of stockholders representing not less than one-third of all the subscribed stock in this corporation. In either case, two days' notice shall be given in the manner provided for the annual meeting of the stockholders, and said notice shall state the purpose for which the meeting is called: PROVIDED, however, that any [44] and all of the stockholders may by letter or telegraphic message waive the giving of notice of any and all special or regular meetings of the stockholders.

III.

Any stockholders may vote by proxy, but such proxy shall be appointed by telegraph or by a writing subscribed by each stockholder and filed with the secretary at or before the time the vote is tendered; such proxy may be for any particular meeting or for all meetings until revoked.

IV.

When a majority of the stock is represented at a meeting of the stockholders, such meeting shall have power to transact any business that may properly come before it, but in case less than a majority of the stock is represented, the meeting shall have no power to transact business, except to adjourn to some other day.

V.

No notice shall be necessary for the holding of any adjourned meeting of the stockholders or directors.

VI.

The board of directors of this corporation shall consist of five members. Each director shall be a stockholder of the corporation, and in case a director shall cease to be a stockholder, he shall likewise cease to be a director.

[45] A majority of the directors shall constitute a quorum for the transaction of business at any and all meetings of the directors.

A vacancy in said board of directors shall be filled by the remaining directors, and the director so elected shall hold office until the next annual meeting or until his successor is elected and qualified.

VII.

The officers of this corporation shall be a president, a vice-president, a secretary, a treasurer and a superintendent.

One person may hold more than one office if in the judgment of the board of directors it is advisable so to do, and a director may hold one or more offices together with that of director.

VIII.

At the first meeting of the board of directors after their election, they shall elect from among their own number a president and vice-president, who shall hold office until the next annual meeting of the stockholders and until their successors are elected and have qualified.

IX.

At the first meeting of the board of directors after their election, they shall also appoint a secre-

tary, a treasurer and a superintendent, who shall hold office during the pleasure of the directors.

X.

[46] The president shall preside at all meetings of the stockholders and directors and shall be the inspector of all elections of directors, and certify who are elected. He shall also act as inspector of the voting on any other matter or resolution unless the meeting appoint special inspectors for such purpose. He shall sign, on behalf of the corporation, all deeds, contracts and promissory notes, except when otherwise expressly directed by the board of directors, and shall have a general supervision over all the property, business and interests of the corporation, as well as over all its officers, employees and agents.

XI.

In the absence of the president, his disqualification or inability to act, the vice-president shall possess the powers and discharge the duties of the president.

XII.

Should the president or vice-president resign, become disqualified, or be removed, the vacancy so created shall be filled by the board of directors.

XIII.

The secretary shall keep a fair and correct record of all the meetings of the stockholders and directors and other official business of the corporation. He shall prepare and submit at every meeting of the stockholders a certified list of all of the stockholders of the corporation, [47] and of those entitled to

vote at such meeting, and such list shall be *prima facie* evidence of the right to vote. He shall also produce the stock-book whenever required so to do by any stockholder. He shall have the custody of the corporate seal and it shall be his duty to affix the same to all deeds, contracts, or other documents executed by the corporation, and attest such deeds, leases or documents; but he shall not affix said seal to any instrument, except stock certificates, cremation certificates and certified copies, unless previously authorized so to do by a resolution of the board of directors or stockholders. He shall also give notice of meetings to the stockholders and directors, and perform such other duties as may be required of him by the board of directors.

XIV.

The treasurer shall have charge of all the moneys and securities for money and other assets of the corporation. He shall keep a correct and full account of all moneys received and disbursed by him as such treasurer, and of all securities and other assets received or delivered by him, in books belonging to the corporation. He shall deposit all moneys coming into his hands, that are not required for the immediate current purpose of the corporation, in the name of the corporation with such bank or banks as shall be designated by the board of directors. He shall render to the board of directors at the regular monthly meetings thereof, or at any other time that they [48] or the president of this corporation may require it, an account of all his transactions as treasurer and of the financial condition

of the corporation, and at the regular annual meeting of the stockholders of the corporation he shall make a like report for the preceding year. He shall only disburse the funds of the corporation as may be directed or ordered by the board of directors, taking proper vouchers, receipts and acquittances therefor. He shall also perform such other duties as the board of directors may from time to time direct.

XV.

All checks, drafts, or orders for the payment of money, shall be signed by the president or vice-president, and countersigned by the secretary, and by no one else unless authorized by the board of directors. All warrants on the treasurer for the payment of money shall be signed by the secretary and countersigned by the president or vice-president.

XVI.

The superintendent shall have, subject to the president and board of directors, general charge and supervision of the business of the company, and of its employees, whom he may appoint and discharge at his pleasure and discretion; but notice of all such appointments or discharges shall be forthwith given to the president, who shall have power to [49] suspend action on any appointment or discharge until the next meeting of the board of directors, when the matter shall be presented to the board to take action thereon. He shall cause correct and necessary books of account to be kept of all business transacted by the corporation. He

shall, at each monthly meeting of the directors, submit a statement in writing of the business of said corporation for the previous month, embracing in detail all matters of collections and expenditures, and all purchases made by the corporation. He shall submit a report of the business of the corporation at the annual meeting of the stockholders in each year, which report shall be an exact statement in detail of the business of the corporation for the preceding year, embracing all details connected therewith, and shall also show the gain or loss for such year. He shall not have power to sign the name of the corporation to any bill of exchange, promissory note or other evidence of indebtedness, nor to incur any indebtedness in its name or for its account, nor pledge its property, nor its credit as security for any other corporation or person; and he shall perform such other duties incident to the duties of superintendent as the board may from time to time direct.

XVII.

The board of directors may require any of its officers to give bonds in such amount as they may deem best, with [50] security to be approved by the board, conditioned for the faithful and honest discharge of the duties of the officer giving such bond.

XVIII.

The salaries of all officers shall be fixed by the board of directors, and those of all employees and agents shall be fixed by the superintendent, subject to the approval of said board of directors. No of-

ficer or director of the corporation shall be entitled to any salary or other compensation for any services rendered the corporation, except when fixed and authorized or approved by resolution of the board of directors.

XIX.

A special meeting of the board of directors shall be called by the secretary whenever he is requested to do so by the president or by a majority of the directors, by giving notice in writing, either personally to each director, or by mailing such notice to his address. This notice shall be given at least twenty-four hours prior to the holding of such special meeting: PROVIDED, that it shall not be necessary to notify any director who may be out of the state, and that a meeting may be held at any time all of the directors are present; and, PROVIDED [51] FURTHER, that any of the directors may by letter or telegraph message, waive the giving to them of notice of any or all special or regular meetings of the board of directors.

XX.

The shares of the capital stock of this corporation shall be represented by stock certificates signed by the president and attested by the secretary under the corporate seal of the corporation.

XXI.

The shares of the capital stock in this corporation are transferable only on the books of the corporation by the holder thereof in person, or by attorney,

upon surrender of the certificate issued therefor, properly endorsed.

XXII.

The earnings of this corporation shall be transferred only on its books, according to the order of the board of directors made at regular or special meetings, and no dividends shall be paid to stockholders, or other disposition of earnings made, except upon the order of the board of directors.

XXIII.

No deed, instrument, or contract of any description, purporting to be made on behalf of the corporation, shall be valid unless authorized by the board of directors, and [52] no instrument shall be deemed to have been duly executed on behalf of the corporation unless it shall be sealed with the corporate seal, signed by the president or by the secretary.

XXIV.

The seal heretofore adopted and used by this corporation is hereby formally adopted as the seal of this corporation, an impression thereof being as follows:

XXV.

These by-laws may be changed or amended at any regular or special meeting of the board of directors of the corporation by a vote of a majority of the directors.

[53] After a full discussion by the Board of Directors, said motion to adopt said by-laws was seconded, and the same was unanimously adopted.

The following resolution was introduced and unanimously adopted:

“RESOLVED that the salaries for the president of said corporation and for the Superintendent of said corporation, during the entire year of 1919, be fixed at \$400.00 per month, payable monthly.”

The following resolution was introduced and unanimously adopted:

“WHEREAS, at a meeting of the stockholders of this corporation, held December 11, 1919, the following resolution was unanimously adopted:

‘WHEREAS, at a meeting of the Board of Directors of this corporation, held on the 4th day of March, 1913, a resolution was adopted authorizing and directing that ten per cent of all receipts for niches, urns and vaults be set aside as a maintenance fund; and,

WHEREAS, ten percent. of said receipts is not sufficient for said maintenance fund;

NOW, THEREFORE, be it resolved that the stockholders recommend to the Board of Directors that from and after January 1, 1919, twenty percent. of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of this corporation.’

and,

WHEREAS, twenty percent. of the maintenance fund has been set aside in accordance with said resolution from January 1, 1919;

NOW, THEREFORE, be it resolved that

from and after the 1st day of January, 1919, twenty percent. of all receipts from the sale of niches, urns and vaults be and the same is hereby set aside to the maintenance fund of this corporation.''

There being no further business, the meeting was, upon motion, adjourned.

[Seal]

OLIVE JONES,
Secretary.

E. M. WELCH,
Chairman.

Now, December 7, 1928, the foregoing stipulation of facts certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[54] A true copy.

[Seal]

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.
DOCKET Nos. 10037, 22158, 23912.

United States Board of Tax Appeals.

Promulgated January 20, 1928.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Amount set aside by petitioner for perpetual care of niches, urns, and vaults *held* to be within gross income.

CHARLES E. McCULLOCH, Esq., for the Petitioner.

SHELBY S. FAULKNER, Esq., for the Respondent.

Deficiencies in income taxes have been determined for the years 1919, 1920, 1921, and 1922, in the respective amounts of \$5,764.69, \$4,402.68, \$4,519.65, and \$2,192.25. The facts were stipulated.

FINDINGS OF FACT.

Petitioner was organized under the laws of the State of Oregon, for the purpose of the construction, maintenance and operation of crematories and columbaria and the conducting of the business of incinerating human remains and the burial and perpetual care of the ashes resulting therefrom, and of conducting the business of funeral director and undertaker. During the years 1919 to 1922, inclusive, petitioner was engaged in the business of operating a crematorium in the City of Portland, Oregon, for the incineration of human remains and owning and operating a building in which were niches for the repository of urns containing the ashes of incinerated human bodies and vaults for the burial of the dead.

[55] During the said years petitioner sold niches and vaults for the aforesaid purposes and gave to purchasers deeds covering such niches and vault spaces. The deeds given to purchasers of vaults and niches were identical in form except as to the description of the particular niche or vault con-

veyed, and contained a covenant running to the grantee and his heirs that the petitioner would maintain the columbarium containing said niche or the vault forever.

At a meeting of the directors held on March 4, 1913, the following resolution was adopted:

On motion it was ordered by the board that ten per cent of all receipts for sale of niches and vaults be set apart as and for a maintenance fund.

On December 1, 1918, the present stockholders acquired all of the stock of petitioner, but from and after that date until March 3, 1920, there was no legally constituted board of directors and there were no legally elected officers, but E. M. Welch, Olive Jones and George W. Baldwin acted as directors and officers of the petitioner. No formal meeting of the stockholders was held from the date of their purchase of the stock until December 11, 1919, at which time the stockholders met and adopted a resolution ratifying and confirming all acts after December 1, 1918, of E. M. Welch, as president, and Olive Jones, as secretary of the corporation. At this meeting the stockholders also adopted a resolution recommending to the board of directors that from and after January 1, 1919, 20 per centum of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of the association, instead of the 10 per centum theretofore authorized to be set aside, [56] which 10 per cent, it was recited, was not sufficient for said maintenance fund.

On March 3, 1920, there was held a formal meeting of the directors who ratified, confirmed and approved all acts of E. M. Welch, as president, and Olive Jones, as secretary, during the period from December 1, 1918, to the date of the meeting. The directors adopted a set of by-laws which contained no reference to a maintenance fund. The directors adopted the following resolution to put into effect the recommendation of the stockholders that the maintenance fund be increased:

WHEREAS, at a meeting of the stockholders of this corporation, held December 11, 1919, the following resolution was unanimously adopted:

WHEREAS, at a meeting of the Board of Directors of this corporation held on the 4th day of March, 1913, a resolution was adopted authorizing and directing that ten per cent. of all receipts for niches, urns and vaults be set aside as a maintenance fund; and

WHEREAS, ten per cent. of said receipts is not sufficient for said maintenance fund;

NOW, THEREFORE, be it resolved that the stockholders recommend to the Board of Directors that from and after January 1, 1919, twenty per cent. of the receipts from the sale of niches, urns and vaults be paid and set aside to the maintenance fund of this corporation.

and

WHEREAS, twenty per cent. of the maintenance fund has been set aside in accordance with said resolution from January 1, 1919;

NOW, THEREFORE, be it resolved that from and after the 1st day of January, 1919, twenty per cent. of all receipts from the sale of niches, urns and vaults be and the same is hereby set aside to the maintenance fund of this corporation.

During the years 1919, 1920, 1921, and 1922, petitioner placed in a permanent maintenance fund 20 per centum of the gross selling price of [57] all urns, niches and vaults sold by it, the amounts placed in such funds for each of the years being as follows:

Year	Amount
1919	\$12,827.16
1920	17,906.20
1921	17,076.73
1922	17,538.03

The deductions of 20 per centum of the gross selling price of the urns, niches and vaults for the maintenance fund were made during 1919 pursuant to informal agreement of the acting board of directors and officers and confirmed by the stockholders and directors as hereinbefore set forth. During the years 1920, 1921, and 1922, all additions to the maintenance fund were made pursuant to and under authority of the above mentioned resolutions. All sales by the petitioner were made with the representation to the purchasers that the covenant to maintain the property was backed by a permanent maintenance fund and that a portion of the purchase price paid by said purchaser would be placed in the maintenance fund. It was also represented to each purchaser that the maintenance

fund could not and would not be used for any other purpose. No specific representation was made as to the handling and control of the fund unless the purchaser made specific inquiry, in which event he was informed that the handling and control were with the petitioner. The income from the maintenance fund has at all times been used for the maintenance and upkeep of the property sold, but always through the regular income and expense accounts of the corporation. The income from the maintenance fund was mingled with other income of petitioner and expended for maintenance along with other funds of petitioner. The income from the maintenance fund was for each of the years in question credited directly to the profit [58] and loss account of petitioner.

The maintenance and upkeep of the property during each of the years in question required more money than the income from the maintenance fund. The deficiency was supplied from the income of the petitioner and not from the principal of the maintenance fund. Prior to November 3, 1920, there was no separate investment account maintained in petitioner's books for the maintenance fund, but the amounts in said investment fund were in part mingled with other assets of the petitioner. On November 3, 1920, the petitioner invested \$29,816.51 in United States Liberty Loan Bonds, and these bonds were carried in the account entitled "Investment-Reserve for Maintenance (Liberty Bonds, W. S. S., etc.)." There were no changes in this account to December 31, 1920, at which time it

showed a balance of \$29,816.51. Additions to the investment account representing Liberty Bonds and War Savings Stamps were made during 1921, the balance in the account at December 31, 1921, being \$35,548.09, all of which was invested in Liberty Bonds and War Savings Stamps. In 1922 there were added to the account items of Liberty Bonds, corporate stocks, War Savings Stamps and cash, and there was also a withdrawal of Liberty Bonds, which left a balance in the account at December 31, 1922, of \$65,348.12, included in which was a loan of \$20,000 made by the maintenance fund to the petitioner, which loan was used by the petitioner for its corporate purposes.

On its books of account the petitioner reported as gross sales the amounts received from the purchase of urns, niches and vaults less 20 per centum thereof which was placed in the maintenance fund and which did not appear as a part of the item "gross sales."

No dividends were declared by the petitioner during any of the years 1919 to 1922, inclusive.

[59] OPINION.

STERNHAGEN.—All the facts are stipulated, and thus the Board is limited precisely in the scope of its consideration. It is contended that a commercial cremation corporation, by voluntarily setting aside a reserve called a "maintenance fund" for the purpose of performing some of its ordinary contractual obligations the actual cost of which is not known, which fund is so free from outside con-

straint that the corporation may "borrow" from it at will and so far as appears may limit its amount at will, has created a trust, itself the trustee. It is not an express trust, so it must be implied. The implication seems to rest on the covenant in the deed, the resolution of the directors establishing the fund, and the salesmen's "representations to purchasers." But these constitute no more than a contractual obligation cognizable at common law and a means privately adopted by the corporation to fulfill it. We can find no ground upon which a court of equity would imply a trust or administer it. The decisions of the Board which proceed upon an express trust either written or oral or under a state law, are not controlling here, there being neither words of trust nor public command. And of course the powers of this Board are such that its holding does not establish the trust or estop the petitioner to deny it if a grantee were to seek to enforce a trust obligation in chancery, as in *Bourland vs. Springdale Cemetery Assn.*, 158 Ill. 458, 42 N. E. 86. If it were a trust it would require consideration of section 219, but it does not appear whether the petitioner had regarded itself as required by that section to file a return as a trustee.

In our opinion, all of the amounts received by petitioner were within [60] its gross income, and there is no warrant for treating any part of it as a separately identified sum as if petitioner never received it. Of course such sum as it expends or incurs annually in the performance of its business functions, whether of maintenance or otherwise, is a proper deduction. See *Springdale Cemetery*

Assn., 3 B. T. A. 223; Mead Construction Co., 3 B. T. A. 438.

Reviewed by the Board.

Judgment will be entered on 15 days' notice,

under Rule 50.

SMITH did not participate.

[61] ARUNDELL, Dissenting.—I cannot agree with the majority opinion, as I think that the question here involved has been settled by decisions of the Board in *Metairie Cemetery Association vs. Commissioner*, 4 B. T. A. 903 and *Inglewood Park Cemetery Association vs. Commissioner*, 6 B. T. A. 386. In the *Metairie* case contracts were issued to plot owners providing for perpetual care, but containing no provisions (except in a few cases) as to the use to which the purchase price of the plot was to be put. It was, however, orally represented to purchasers that the purchase price was to be held in trust, and after the taxable years such representation was declared of record by formal resolution of the association. The Board there held that the parol agreement was sufficient to create a valid trust. In the present case there is, in addition to the parol agreement, a formal resolution during the taxable years setting aside the amounts for perpetual care. In the *Metairie* case there was a state law providing that owners of burial plots may convey their plots back to the cemetery company to hold perpetually in trust. It does not appear from the findings of fact and opinion of

the Board that any plats were conveyed to the association and so it cannot be said that the state law had anything to do with the case. In the Inglewood case there was a state law containing mandatory provisions with respect to the use of perpetual care funds and that seems to be the only material distinction between that case and the one here under consideration. The presence of a state law forbidding the use of perpetual care funds for any other purpose may aid in establishing the fact of the existence of a trust, but no one will say that an equally valid trust may not be created by the acts of the parties.

The prevailing opinion refers to other "decisions of the Board which [62] proceed upon an express trust either written or oral." None of the decisions indicate whether they were predicated on the nature of the trust and they do not say whether as a matter of law the Board found the trust to be express or implied. In both the *Metairie* and *Inglewood* cases there were express covenants concerning perpetual care, but there was nothing, other than oral representations to purchasers, as to the fund to be held in trust. If an express trust can be gathered from oral representations in these cases, why does not the same rule apply here? But I do not think it necessary to decide in any of these cases whether the trust is express or implied; it is sufficient if either kind can be found. It has been often held that no technical language nor specific words are necessary to create a trust. As is said in *Chicago Rwy. vs. Des Moines Rwy.*, 254 U. S. 196, 208:

“It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. *Colton vs. Colton*, 127 U. S. 300, 310.”

There is here no lack of certainty, as urged by the respondent. The representations to purchasers and the deeds given them establish the purpose to which the funds were to be put and who the beneficiaries were. The records of the corporation determine the amount of the fund.

The acts of the petitioner in representing to purchasers that it had a permanent maintenance fund, in covenanting for perpetual care, and in formally setting aside a specified portion of the amounts received, we think were sufficient to create an enforceable trust. In *Holmes vs. Dowie*, 148 Fed. 634, 638, it is said:

“It is a well recognized principle of equity that where a person accepts money or property to be used by him for the benefit of some other person or persons, or for the advancement of some lawful enterprise, such money or property constitutes a trust fund.”

[63] The prevailing opinion cites the decision in *Springdale Cemetery Association*, 3 B. T. A. 223. An essential difference between the cases is that in the *Springdale* case, it was found as a fact that:

“The corporation’s by-laws contained no provisions for appropriating any part of the receipts from the sale of lots as such perpetual

care fund, and no resolution to that effect was passed by the directors.”

Nor does the case of Mead Construction Co., 3 B. T. A. 438, seem to be in point. There the sole question was whether a certain part of the amount due the taxpayer for paving work which was withheld by a municipality was income to the taxpayer; there was no question of whether any part of the amount received by the taxpayer was exempt from tax.

LANSDON, TRUSSELL and LOVE concur in this dissent.

Now, December 7, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[64] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals, Washington.

DOCKET No. 10037.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

The respondent having filed a proposed judgment pursuant to the Board's report of January 20, 1928, in the above-entitled proceeding, 10 B. T. A. 65, and hearing thereon having been had after notice and no one appearing in opposition thereto, it is

ORDERED, ADJUDGED and DECIDED that there is a deficiency of \$5,764.69 for 1919.

J. M. STERNHAGEN.

Member United States Board of Tax Appeals.

Entered: Apr. 19, 1928.

Now, December 7, 1928, the foregoing judgment certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[65] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals, Washington.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

The respondent having filed a proposed judgment pursuant to the Board's report of January 20, 1928, in the above-entitled proceeding, 10 B. T. A. 65, and hearing thereon having been had after notice and no one appearing in opposition thereto, it is

ORDERED, ADJUDGED and DECIDED that there is a deficiency of \$2,192.25 for 1922.

J. M. STERNHAGEN.

Member United States Board of Tax Appeals.

Entered: Apr. 19, 1928.

Now, December 7, 1928, the foregoing judgment certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[66] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals, Washington.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

The respondent having filed a proposed judgment pursuant to the Board's report of January 20, 1928, in the above-entitled proceeding, 10 B. T. A. 65, and hearing thereon having been had after notice and no one appearing in opposition thereto, it is

ORDERED, ADJUDGED and DECIDED that there are deficiencies of \$4,402.68 and \$4,519.65 for 1920 and 1921, respectively.

J. M. STERNHAGEN.

Member United States Board of Tax Appeals.

Entered: Apr. 20, 1928.

Now, December 7, 1928, the foregoing judgment certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[67] Filed Oct. 19, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 10037.

PORTLAND CREMATION ASSOCIATION,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION FOR RE-
VIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS.

To the Above-named Respondent, and to C. M.
CHAREST, General Counsel, Bureau of In-
ternal Revenue, His Attorney:

Notice is hereby given that Portland Cremation
Association, the above-named petitioner, has filed
with the United States Board of Tax Appeals a
petition for the review of the decision and final
order of redetermination of the United States
Board of Tax Appeals rendered and entered on
April 19, 1928, in the case of Portland Cremation
Association, Petitioner, vs. Commissioner of Inter-
nal Revenue, Respondent, Docket No. 10037.

Dated at Portland, Oregon, this 18th day of Oc-
tober, 1928.

PORTLAND CREMATION ASSOCIA-
TION.

By CHARLES E. McCULLOCH and
IVAN F. PHIPPS,

Its Attorneys.

[68] Filed Oct. 18, 1928. United States Board
of Tax Appeals.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. ———.

October Term, 1928.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Portland Cremation Association, pursuant to
the provisions of Section 1001 of the Revenue Act
of 1926, as amended by Section 603 of the Revenue
Act of 1928, presents this, its petition, and respect-
fully prays for the review of the decision of the
United States Board of Tax Appeals rendered and
entered on the 19th day of April, 1928, in Docket
No. 10037, approving a deficiency in the income and
profits taxes of the petitioner for the calendar year
1919, in the [69] amount of \$5,764.69, and in
support of its petition for such review respectfully
represents as follows:

I.

The Commissioner of Internal Revenue, by his

letter dated November 3, 1925, asserted a deficiency in petitioner's tax liability for the year 1919 in the sum of \$5,764.69. By his letter of November 15, 1926, the Commissioner asserted a deficiency in petitioner's tax liability for 1922 in the sum of \$2,192.25, and by his letter of January 18, 1927, the Commissioner asserted deficiencies in the petitioner's tax liability for the years 1920 and 1921 in the respective amounts of \$4,402.68 and \$4,519.65. Thereafter, and within the times prescribed by law, the petitioner filed with the United States Board of Tax Appeals its petitions requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on April 18, 1927, at which time the three proceedings were consolidated for hearing. The proceedings were submitted to the Board upon a written stipulation of facts. No witnesses were called and no oral testimony was introduced. Thereafter, and on January 20, 1928, the United States Board of Tax Appeals made its findings of fact in substantial accordance with the facts alleged in the petitions and stipulated by the parties, and rendered its opinion approving the determination of the Commissioner. The said findings and opinion were reviewed by the [70] entire Board and upon such review four members thereof dissented. Thereafter, and on April 19, 1928, a final order of redetermination approving the deficiency asserted by the Commissioner for the year 1919 in the sum of \$5,764.69 was duly rendered and entered by the United States Board of Tax Appeals, and likewise on April 19,

1928, there was rendered and entered a final order of redetermination approving the deficiency for 1922 in the sum of \$2,192.25 (Docket No. 2158), and on April 20, 1928, a final order of redetermination was duly rendered and entered approving the asserted deficiencies for 1920 and 1921 in the respective amounts of \$4,402.68 and \$4,519.65. (Docket No. 23912.)

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

This case involves income and profits taxes for the year 1919 and arises under the Revenue Act of 1918.

The controversy between appellant (petitioner before the Board of Tax Appeals and hereinafter referred to as the petitioner) and the Commissioner of Internal Revenue involves the single question whether the Commissioner properly included in petitioner's taxable income certain sums received by petitioner during the year 1919 from sales of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which [71] sums were set aside by petitioner and placed in a permanent maintenance fund which was to be used exclusively for the perpetual care and maintenance of the property so sold and which permanent maintenance fund was so used, or whether such sums so set aside and placed in the permanent maintenance fund constituted a trust fund for the benefit of purchasers of vaults, urns and niches.

The facts are not in dispute, having been stipulated in writing by the parties, and the sole question presented for decision in this proceeding is whether the facts so stipulated by the parties and found by the Board of Tax Appeals are sufficient in law to sustain the decision of the Board of Tax Appeals affirming the Commissioner's determination. A consideration of all of the facts so found by the United States Board of Tax Appeals, is necessarily involved in the review of the Board's decision.

III.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a corporation with its principal place of business in the City of Portland, Oregon. It made its return of annual net income for the year 1919 to the Collector of Internal Revenue at Portland, Oregon. The petitioner, being aggrieved by the said decision and final order of the United States Board of Tax Appeals, seeks a review thereof in [72] accordance with the provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue at Portland, Oregon.

IV.

ASSIGNMENTS OF ERROR.

The petitioner sets forth the following assignments of error:

1. That the United States Board of Tax Appeals erred in deciding and holding that those portions

of the amounts received by petitioner in 1919 from the sale of niches, urns and burial vaults, which were set apart for and in a fund for the permanent maintenance of such property, were properly included in petitioner's income for the year 1919.

2. That the decision and order of redetermination of the United States Board of Tax Appeals is in error in that the findings of fact made by said Board are insufficient to support the said decision and order of redetermination in that such findings show that the sum of \$12,827.16 set aside by petitioner and placed in its permanent maintenance fund in the year 1919 did not inure to the benefit of petitioner but constituted a trust fund for the benefit of purchasers of niches, [73] urns and burial vaults.

3. That the United States Board of Tax Appeals erred in rendering its decision in favor of the respondent.

WHEREFORE, your petitioner prays that this Honorable Court may review said decision and final order of redetermination of the United States Board of Tax Appeals and reserve and set aside the same.

PORTLAND CREMATION ASSOCIATION.

By E. M. WELCH,
President.

CHARLES E. McCULLOCH, and
IVAN F. PHIPPS,

Attorneys for Petitioner and Appellant,
1410 Yeon Building, Portland, Oregon.

[74] State of Oregon,
County of Multnomah,—ss.

I, E. M. Welch, being first duly sworn, on oath say that I am president of Portland Cremation Association, the petitioner and appellant above named, and that as such officer am authorized to sign the foregoing petition for review; that I have read the said petition and know the contents thereof and the facts set forth therein are true as I verily believe; that the said petition is filed in good faith and not for purposes of delay.

E. M. WELCH.

Subscribed and sworn to before me this 10th day of October, 1928.

[Seal]

DAVID L. DAVIES,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Service of within petition and notice accepted this 18th day of October, 1928.

C. M. CHAREST,
General Counsel, Bureau of Int. Rev.

Now, December 7, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[75] Filed Oct. 19, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 22158.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION FOR RE-
VIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS.

To the Above-named Respondent, and to C. M.
CHAREST, General Counsel, Bureau of Inter-
nal Revenue, His Attorney:

Notice is hereby given that Portland Cremation Association, the above-named petitioner, has filed with the United States Board of Tax Appeals a petition for the review of the decision and final order of redetermination of the United States Board of Tax Appeals rendered and entered on April 19, 1928, in the case of Portland Cremation Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 22158.

Dated at Portland, Oregon, this 18th day of October, 1928.

PORTLAND CREMATION ASSOCIA-
TION.

By CHARLES E. McCULLOCH and
IVAN F. PHIPPS,

Its Attorneys.

[76] In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. —.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals, for the Ninth Circuit:

Portland Cremation Association, pursuant to the provisions of Section 1001 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, presents this, its petition, and respectfully prays for the review of the decision of the United States Board of Tax Appeals rendered and entered on the 19th day of April, 1928, in Docket No. 22158, approving a deficiency in the income and profits taxes of the petitioner for the calendar year 1922 in the amount of \$2,192.25, and in support of its petition for such review respectfully represents as follows:

[77] I.

The Commissioner of Internal Revenue, by his letter dated November 3, 1925, asserted a deficiency in

petitioner's tax liability for the year 1919 in the sum of \$5,764.69. By his letter of November 15, 1926, the Commissioner asserted a deficiency in petitioner's tax liability for 1922 in the sum of \$2,192.25, and by his letter of January 18, 1927, the Commissioner asserted deficiencies in the petitioner's tax liability for the years 1920 and 1921 in the respective amounts of \$4,402.68 and \$4,519.65. Thereafter, and within the times prescribed by law, the petitioner filed with the United States Board of Tax Appeals its petitions requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on April 18, 1927, at which time the three proceedings were consolidated for hearing. The proceedings were submitted to the Board upon a written stipulation of facts. No witnesses were called and no oral testimony was introduced. Thereafter, and on January 20, 1928, the United States Board of Tax Appeals made its findings of fact in substantial accordance with the facts alleged in the petitions and stipulated by the parties, and rendered its opinion approving the determination of the Commissioner. The said findings and opinion were reviewed by the entire Board and upon such review four members thereof dissented. Thereafter, and on April 19, 1928, a final order of redetermination approving the deficiency asserted by the Commissioner [78] for the year 1919 in the sum of \$5,764.69 was duly rendered and entered by the United States Board of Tax Appeals, and likewise on April 19, 1928, there was rendered and entered a final order of redetermination approving

the deficiency for 1922 in the sum of \$2,192.25 (Docket No 22158), and on April 20, 1928, a final order of redetermination was duly rendered and entered approving the asserted deficiencies for 1920 and 1921 in the respective amounts of \$4,402.68 and \$4,519.65. (Docket No. 23912.)

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

This case involves income and profits taxes for the year 1922 and arises under the Revenue Act of 1921.

The controversy between appellant (petitioner before the Board of Tax Appeals and hereinafter referred to as the petitioner) and the Commissioner of Internal Revenue involves the single question whether the Commissioner properly included in petitioner's taxable income certain sums received by petitioner during the year 1922 from sales of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which sums were set aside by petitioner and placed in a permanent maintenance fund which was to be used exclusively for the perpetual care and maintenance of the property so sold and which permanent maintenance fund was so used, or whether such sums [79] so set aside and placed in the permanent maintenance fund constituted a trust fund for the benefit of purchasers of vaults, urns and niches.

The facts are not in dispute, having been stipulated in writing by the parties, and the sole question pre-

sented for decision in this proceeding is whether the facts so stipulated by the parties and found by the Board of Tax Appeals are sufficient in law to sustain the decision of the Board of Tax Appeals affirming the Commissioner's determination. A consideration of all of the facts so found by the United States Board of Tax Appeals, is necessarily involved in the review of the Board's decision.

III.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a corporation with its principal place of business in the City of Portland, Oregon. It made its return of annual net income for the year 1922 to the Collector of Internal Revenue at Portland, Oregon. The petitioner, being aggrieved by the said decision and final order of the United States Board of Tax Appeals, seeks a review thereof in accordance with the provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue at Portland, Oregon.

[80] IV.

ASSIGNMENTS OF ERROR.

The petitioner sets forth the following assignments of error

1. That the United States Board of Tax Appeals erred in deciding and holding that those portions of the amounts received by petitioner in 1922 from the sale of niches, urns and burial vaults, which

were set apart for and in a fund for the permanent maintenance of such property, were properly included in petitioner's income for the year 1922.

2. That the decision and order of redetermination of the United States Board of Tax Appeals is in error in that the findings of fact made by said Board are insufficient to support the said decision and order of redetermination in that such findings show that the sum of \$17,538.03 set aside by petitioner and placed in its permanent maintenance fund in the year 1922 did not inure to the benefit of petitioner but constituted a trust fund for the benefit of purchasers of niches, urns and burial vaults.

3. That the United States Board of Tax Appeals erred in rendering its decision in favor of the respondent.

WHEREFORE, your petitioner prays that this Honorable Court may review said decision and final order of redetermination [81] of the United States Board of Tax Appeals and reverse and set aside the same.

PORTLAND CREMATION ASSOCIATION.

By E. M. WELCH,
President.

CHARLES E. McCULLOCH and
IVAN F. PHIPPS,

Attorneys for Petitioner and Appellant,
1410 Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

I, E. M. Welch, being first duly sworn, on oath say that I am president of Portland Crema-

tion Association, the petitioner and appellant above named, and that as such officer am authorized to sign the foregoing petition for review; that I have read the said petition and know the contents thereof and the facts set forth therein are true as I verily believe; that the said petition is filed in good faith and not for purposes of delay.

E. M. WELCH.

Subscribed and sworn to before me this 10th day of October, 1928.

[Seal]

DAVID L. DAVIES,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Service of within petition and notice of filing accepted this 18th day of October, 1928.

C. M. CHAREST,
General Counsel Bureau of Int. Rev.

Now, December 7, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[82] Filed Oct. 18, 1928. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 23912.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION FOR REVIEW
OF DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS.

To the Above-named Respondent, and to C. M.
CHAREST, General Counsel, Bureau of Inter-
nal Revenue, His Attorney:

Notice is hereby given that Portland Cremation Association, the above-named petitioner, has filed with the United States Board of Tax Appeals a petition for the review of the decision and final order of redetermination of the United States Board of Tax Appeals rendered and entered on April 20, 1928, in the case of Portland Cremation Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 23912.

Dated at Portland, Oregon, this 18th day of October, 1928.

PORTLAND CREMATION ASSOCIATION.

By CHARLES E. McCULLOCH and
IVAN F. PHIPPS,

Its Attorneys.

[83] In the United States Circuit Court of Appeals for the Ninth Circuit.

No. —.

PORTLAND CREMATION ASSOCIATION, a Corporation,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Portland Cremation Association, pursuant to the provisions of Section 1001 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, presents this, its petition, and respectfully prays for the review of the decision of the United States Board of Tax Appeals rendered and entered on the 20th day of April, 1928, in Docket No. 23912, approving a deficiency in the income and profits taxes of the petitioner for the calendar years 1920 and 1921, in the respective amounts of \$4,402.68 and \$4,519.65, and in support of its petition for such review respectfully represents as follows:

[84] I.

The Commissioner of Internal Revenue, by his letter dated January 18, 1927, asserted deficiencies in the petitioner's tax liability for the years 1920 and 1921 in the respective amounts of \$4,402.68 and \$4,519.65. Likewise by his letters of November 3, 1925, and November 15, 1926, he asserted deficiencies in petitioner's taxes for the years 1919 and 1922 in the respective amounts of \$5,764.69 and \$2,192.25. Thereafter, and within the times prescribed by law, the petitioner filed with the United States Board of Tax Appeals its petitions requesting the redetermination of such deficiencies. The proceedings duly came on for hearing on April 18, 1927, at which time the three proceedings were consolidated for hearing. The proceedings were submitted to the Board upon a written stipulation of facts. No witnesses were called and no oral testimony was introduced. Thereafter, and on January 20, 1928, the United States Board of Tax Appeals made its findings of fact in substantial accordance with the facts alleged in the petitions and stipulated by the parties, and rendered its opinion approving the determination of the Commissioner. The said findings and opinion were reviewed by the entire Board and upon such review four members thereof dissented. Thereafter, and on April 20, 1928, a final order of redetermination approving the deficiencies asserted by the Commissioner [85] for the years 1920 and 1921 in the respective amounts of \$4,402.68 and \$4,519.65 were duly rendered and entered by the United States

Board of Tax Appeals, and likewise there were rendered and entered on April 19, 1928, final decisions and orders of redetermination in Docket Nos. 10037 and 22158 approving the asserted deficiencies for 1919 and 1922 in the respective amounts of \$5,764.69 and \$2,192.25.

II.

STATEMENT OF THE NATURE OF THE CONTROVERSY.

This case involves income and profits taxes for the years 1920 and 1921 and arises under the Revenue Acts of 1918 and 1921.

The controversy between appellant (petitioner before the Board of Tax Appeals and hereinafter referred to as the petitioner) and the Commissioner of Internal Revenue involves the single question whether the Commissioner properly included in petitioner's taxable income certain sums received by petitioner during the years 1920 and 1921 from sales of vaults, urns and niches for the burial of the dead or within which to place the ashes resulting from the incineration of human remains, which sums were set aside by petitioner and placed in a permanent maintenance fund which was to be used exclusively for the perpetual care and maintenance of the property so sold and which permanent maintenance fund was so used, or whether such sums so set aside and placed in the permanent maintenance fund constituted a [86] trust fund for the benefit of purchasers of vaults, urns and niches.

The facts are not in dispute, having been stipulated

in writing by the parties, and the sole question presented for decision in this proceeding is whether the facts so stipulated by the parties and found by the Board of Tax Appeals are sufficient in law to sustain the decision of the Board of Tax Appeals affirming the Commissioner's determination. A consideration of all of the facts so found by the United States Board of Tax Appeals, is necessarily involved in the review of the Board's decision.

III.

DESIGNATION OF COURT OF REVIEW.

Petitioner is a corporation with its principal place of business in the City of Portland, Oregon. It made its return of annual net income for the years 1920 and 1921 to the Collector of Internal Revenue at Portland, Oregon. The petitioner, being aggrieved by the said decision and final order of the United States Board of Tax Appeals, seeks a review thereof in accordance with the provisions of the Revenue Act of 1962, as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue at Portland, Oregon.

[87] IV.

ASSIGNMENTS OF ERROR.

The petitioner sets forth the following assignments of error:

1. That the United States Board of Tax Appeals erred in deciding and holding that those portions of the amounts received by petitioner in 1920 and 1921

from the sale of niches, urns and burial vaults, which were set apart for and in a fund for the permanent maintenance of such property, were properly included in petitioner's taxable income for the said years.

2. That the decision and order of redetermination of the United States Board of Tax Appeals is in error in that the findings of fact made by said Board are insufficient to support the said decision and order of redetermination in that such findings show that the sums of \$17,906.20 and \$17,538.03 set aside by petitioner and placed in its permanent maintenance fund in the years 1920 and 1921, respectively, did not inure to the benefit of petitioner but constituted a trust fund for the benefit of purchasers of niches, urns and burial vaults.

3. That the United States Board of Tax Appeals erred in rendering its decision in favor of the respondent.

WHEREFORE, your petitioner prays this Honorable Court may review said decision and final order of redetermination of the United States Board of Tax Appeals and reverse [88] and set aside the same.

PORTLAND CREMATION ASSOCIATION.

By E. M. WELCH,
President.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,

Attorneys for Petitioner and Appellant,
1410 Yeon Building, Portland, Oregon.

State of Oregon,
County of Multnomah,—ss.

I, E. M. Welch, being first duly sworn, on oath say that I am president of Portland Cremation Association, the petitioner and appellant above named, and that as such officer am authorized to sign the foregoing petition for review; that I have read the said petition and know the contents thereof and the facts set forth therein are true as I verily believe; that the said petition is filed in good faith and not for purposes of delay.

E. M. WELCH.

Subscribed and sworn to before me this 10th day of October, 1928.

[Seal]

DAVID L. DAVIES,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Service of within petition accepted this 18th day of October, 1928.

[Seal]

C. M. CHAREST,
General Counsel, Bureau of Int. Rev.

Now, December 7, 1928, the foregoing petition for review certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[89] Filed Oct. 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10,037.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax
Appeals:

YOU WILL PLEASE prepare and, within sixty days from the date of the filing of the petition for review in the above-entitled proceeding, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the above-entitled proceeding.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board, including final order of redetermination dated April 19, 1928.

4. Petition for review and notice of filing thereof, with notation of acceptance of service of petition and notice of filing by counsel for respondent.

5. Stipulation of facts.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1928.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,
Counsel for Petitioner.

Now, December 7, 1928, the foregoing praecipe for record certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[90] Filed Oct. 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 22,158.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

YOU WILL PLEASE prepare and, within sixty days from the date of the filing of the petition for

review in the above-entitled proceeding, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the above-entitled proceeding.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board, including final order of redetermination dated April 19, 1928.

4. Petition for review and notice of filing thereof, with notation of acceptance of service of petition and notice of filing by counsel for respondent.

5. Stipulation of facts.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1928.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,

Counsel for Petitioner.

Now, December 7, 1928, the foregoing praecipe for record certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[91] Filed Oct. 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 23,912.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax
Appeals:

YOU WILL PLEASE prepare, and, within sixty days from the date of the filing of the petition for review in the above-entitled proceeding, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in the above-entitled proceeding.

2. Pleadings before the Board.

3. Findings of fact, opinion and decision of the Board, including final order of redetermination dated April 20, 1928.

4. Petition for review and notice of filing thereof, with notation of acceptance of service of petition and notice of filing by counsel for respondent.

5. Stipulation of facts.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1928.

CHARLES E. McCULLOCH,
IVAN F. PHIPPS,

Counsel for Petitioner.

Now, December 7, 1928, the foregoing praecipe for record certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5661. United States Circuit Court of Appeals for the Ninth Circuit. Portland Cremation Association, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petitions to Review Orders of the United States Board of Tax Appeals.

Filed December 17, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit.

PORTLAND CREMATION ASSOCIATION, a
Corporation,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellees.

STIPULATION RE PRINTING OF RECORD.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record that the three above-entitled causes (on petition for review of decisions of the United States Board of Tax Appeals) shall be consolidated for purposes of preparation and filing of briefs and for hearing and decision, and that the printed transcript of record in the said three causes so consolidated shall be prepared under one cover and shall contain the following:

1. Docket entries of proceedings before the United States Board of Tax Appeals in each of the three causes.
2. Separate petitions in each of the three causes.
3. Separate answers in each of the three causes.
4. Stipulation of facts in these causes is consolidated for hearing before the United States Board of Tax Appeals.
5. Findings of fact, opinion and decision of the Board.

6. Separate final orders of redetermination in each of the three causes.
7. Separate petitions for review and notices of the filing thereof in each of the three causes.
8. This stipulation.

CHARLES E. McCULLOCH,

IVAN F. PHIPPS,

CAREY & KERR,

Attorneys for Appellant.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue,

Counsel for Appellee.

[Endorsed]: Stipulation. Filed Nov. 27, 1928.
Paul P. O'Brien, Clerk.

Refiled Dec. 17, 1928. Paul P. O'Brien, Clerk.